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IN THE

SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1979

NATIONAL BROADCASTING COMPANY, INC.
Petitioner,

v.

C. BRIAN BURKE, M.D.,
Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Manchester, N.H. 03101

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STATEMENT OF THE CASE

The following is deemed necessary to correct inaccuracies and omissions in the Petitioner's Statement of the Case:

After reading of Dr. Burke's unique film, Professor Grzimek, by way of letter dated September 3, 1973, requested permission to make personal use of that film. The key language of Dr. Grzimek's letter is:

> "I personally would like to use the film which was done of this incident in my lecture at the university and in a television programme." (emphasis added)

(Appendix A). On September 17, 1973 Dr. Burke wrote to Professor Grzimek granting him the requested use of the film (Appendix B). No further authorization to make use of his film was granted to anyone by Dr. Burke.

More than three years after Professor Grzimek thanked Dr. Burke for use of the valuable film, Professor Grzimek received a written request from Colin Willock, Executive Director of Survival Anglia, Limited (SAL) dated November 17, 1976 (Appendix C). Mr. Willock, who had learned of Dr. Burke's important film footage, requested in his letter to Professor Grzimek that he be provided with a copy of that film, because it would be "just right" for a special program they were making about animal parenthood. Professor Grzimek's response of November 24, 1976 indicated that the film was being forwarded, and requested that Dr. Burke be given credit in the text of the program for his film (Appendix D). Dr. Burke was not informed of this proposed commercial use of his film or exchange of correspondence between Willock and Grzimek.

On November 29, 1976 Mr. Willock wrote to Professor Grzimek thanking him for the "most sensational footage" and inquiring as to what should be done about paying Dr. Burke (Appendix E). Professor Grzimek's response was by way of letter dated December 8, 1976 in which he provided Mr. Willock with Dr. Burke's address (Appendix F). SAL included 33 feet of the

Respondent's film in its special, "The Parenthood Game", which was narrated by the actor Bob Newhart. The Petitioner, National Broadcasting Company, Inc., purchased "The Parenthood Game" from SAL, and on January 27, 1977 nationally telecast it over its network on prime time, for which it received $374,425 in net advertising revenues. It was not until February 14, 1977 that an administrative assistant at SAL wrote to Dr. Burke informing him that his film had been used and stating that Professor Grzimek had said that he (Dr. Burke) would be happy to let them use the film (Appendix G). In that letter Dr. Burke was also asked the following question: "Could you please let me know what payment is due you, and I will process this."

On March 2, 1977 Dr. Burke replied to SAL by letter in which he stated:

> "Professional Grzimek was incorrect in assuring you that he had my permission to release this film for commercial use...
>
> The film of the zebra/lion encounter was loaned to Dr. Grzimek in 1973 for his personal teaching use at the University of Frankfort and for inclusion in a German television programme. No further television application was discussed or permitted. (emphasis added)

(Appendix H). Dr. Burke's letter of March 2, 1977 was forwarded to Professor Grzimek by SAL and Professor Grzimek wrote to Dr. Burke on March 25, 1977. In that letter Professor Grzimek stressed:

> "...I did not at all write that I have your permission to release this film for commercial use all over the world. Instead of that I gave them in my letter of 24th of November, 1976, your address, so that they could contact you."

(Appendix J). On July 12, 1977, Dr. Burke brought suit against the Petitioner in the United States District Court for the District of New Hampshire for infringement of his common law copyright. The Petitioner is represented by counsel for SAL under an indemnity agreement between itself and SAL.

The parties filed cross motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Both parties agreed that there was no genuine issue of material fact concerning liability which remained unresolved. Consequently, all issues of liability were to be decided in the cross motion for summary judgment, and any further defenses other than those regarding damages were waived.

The District Court ruled in favor of the Petitioner by granting its motion for summary judgment and denying Dr. Burke's cross motion for summary judgment. However, on appeal, the United States Court of Appeals for the First Circuit reversed the judgment of the District Court by granting Dr. Burke's motion for summary judgment and remanding the case to the lower court for a trial on the issue of damages.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS IN THE OTHER CIRCUITS OR EVEN WITH THE DISTRICT COURT IN THIS VERY ACTION IN REGARD TO THE LAW.

The Petitioner has failed to cite a single decision in conflict with the decision of the First Circuit in this case. In fact, both the District Court and the Circuit Court correctly enunciated the applicable common law principles governing copyrights. The only significant difference in the opinions of those two courts was the application of the facts in this case to those accepted legal principles.

Both lower courts recognized the rule of law that at common law the creator held an absolute copyright to his work so long as he did not permit a general publication of it. *Caliga v. Inter Ocean Newspaper Co.*, 215 U.S. 182 (1909). Abandonment of common law copyright occurs in a general, as opposed to a limited, publication. The test of general publication was stated in *Patterson v. Century Production*, 93 F. 2d 489 (2nd Cir. 1937):

> "The test of general publication is whether the exhibition of the work to the public is under such conditions

> as to show dedication without reservation of rights or only the right to view or inspect it without more."

The test for limited publication was established in *White v. Kimmel,* 193 F. 2d 744 (9th Cir. 1952), wherein the Court stated at 746-747 a two-pronged standard:

> "...a limited publication which communicates the contents...to a definitely selected group and for a limited purpose, and without the right of diffusion, reproduction, distribution or sale, is considered a "limited publication", which does not result in loss of the author's common-law right to his manuscript, but that circulation must be restricted both as to persons and purpose..."

There being no dispute in either lower court as to the controlling law, the only question for those courts to resolve was whether the factual circumstances would compel a finding of a limited rather than general publication by Dr. Burke. The opinion of the First Circuit, in fact, points out that the case is "close". (1st Cir.) Opinion at 4. However, the closeness of the case concerns the facts, not the law. Consequently, any consideration of this case by this court will merely center on factual rather than any important legal issues, and will certainly not resolve any conflict in decisions among the circuits.

II. THE DECISION BELOW WAS CORRECTLY DECIDED

The Petitioner misconstrues the opinion of the Court of Appeals in this action. The Court did not look to Dr. Burke's subjective intent, but, to the contrary, noted that the test of a limited publication depends "less on the creator's intentions than on his actions". (1st Cir.) Opinion at 7.

The lower court's analysis of the facts reveals that it correctly looked to the reasonable interpretation of Dr. Burke's actions rather than his intent. The relevant portion of the opinion follows:

> "Dr. Burke sent the film to Dr. Grzimek in response to a request to have a copy to use personally in lectures and on a television program. Dr. Grzimek made a copy, apparently for his own use, but this was the extent of the copying and distribution authorized at that time. As Dr. Burke knew, Dr. Grzimek was a professor on non-commercial television. Allowing the film to be used for the purposes requested was not a blanket authorization to use it for any purpose, much less to release it to a commercial producer. True, Dr. Burke did not state explicitly in his letter that Dr. Grzimek could not distribute copies of the film to others, or use it for other purposes, but we think such limitations are reasonably to be implied: Dr. Grzimek made a specific request to use the film for a specific purpose, and Dr. Burke's affirmative response cannot be thought to have authorized any further use or other purpose."

(1st Cir.) Opinion at 10. Based upon that analysis the Court correctly ruled that:

> "Dr. Grzimek had no reason to suppose that he was free to distribute copies of the film at will, or to license its commercial use. We find that only a "limited" publication occurred, and that Dr. Burke's common law copyright was not lost."

(1st Cir.) Opinion at 11. There was no error in that ruling, and it expresses the most reasonable interpretation of Dr. Burke's actions surrounding the release of his film.

Furthermore, it is inappropriate for Petitioner to characterize itself as an innocent third party. The real party in interest in this action is SAL because of its indemnification agreement with NBC. SAL was twice provided with Dr. Burke's name and address before his film was shown on national television, yet it never contacted him to seek his permission to use that film. (Appendices E, G). Moreover, SAL's correspondence discloses that it recognized Dr. Burke's continuing possessory interest in

the film (Appendices F, H). Thus, arguments citing Petitioner as an innocent third party do not apply here.

The Petitioner also argues that to let stand the decision below would result in windfall profits to Dr. Burke and others similarly situated. However, the only potential windfall profit to be made in this case would be for Petitioner and SAL. They wrongfully appropriated Dr. Burke's important film for their own commercial gain without notifying him or compensating him therefore, and should not be permitted to retain profits rightfully belonging to Dr. Burke.

III. THE DECISION BELOW DOES NOT PRESENT AN IMPORTANT OR SPECIAL ISSUE FOR WHICH REVIEW SHOULD BE GRANTED

This Court in *Layne & Bowler Corp. v. Western Well Workers,* 261 U.S. 387, 393 (1923) stated a fundamental principle regarding review by writ of certiorari:

> "...it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties..."

Supreme Court Rule 19 (1) embodies this same principle by stating that review is a matter "of sound judicial discretion".

The First Circuit noted in their decision below that the Copyright Act of 1976 abolished common law copyright. Petitioner's argument that the decision below will foster future inequitable results is therefore without merit, because the decision will affect only these parties and not the public at large. Because the decision is principally only of historical value to the law of copyright, it is not one the settlement of which is of great importance to the public.

Whether the creator of a work has lost his common copyright by publication is a matter of state law. *Capitol Records, Inc. v. Mercury Records Corporation,* 221 F. 2d 657 (2nd Cir. 1955). The petition here fails, therefore, to raise a substantial federal question.

CONCLUSION

This case does not present a situation where there is a conflict among decisions of the circuit courts to be resolved. Rather, the law in this area has essentially been undisputed throughout the proceedings below. Furthermore, the decision of the Court of Appeals was correct. Dr. Burke never generally published his film, and he retained his common law copyright therein. Finally, a decision by this court in this action will have impact only on the immediate parties and not the public at large. Consequently, Petitioner's application for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED,

DAVID L. NIXON, ESQ.
RANDOLPH J. REIS, ESQ.
of Counsel
FRANK E. KENISON, ESQ.
of Counsel

BROWN & NIXON PROFESSIONAL ASSOCIATION

APPENDIX "A"

Mr.
C. Brian Burke, M.D.
Hitchcock Clinic

HANOVER, NEW HAMPSHIRE
U.S.A.

3rd September 1973/Ti/X/GD

Dear Mr. Burke,

I just found your letter in NATURAL HISTORY August/September 1972 page 12 "Incident in the Serengeti". I hope that you have no objection that we print a German translation of your letter in our journal DAS TIER (THE ANIMAL). We also would like to get a copy of your pictures and, in case you have done several, of the other ones too.

I personally would like to use the film which was done of this incident in my lectures at the university and in a television programme. Is this film still available? Was it done in colour? Would it be possible to get a copy of it on my expenses?

Many thanks in advance for your co-operation,
Yours sincerely,

(B. Grzimek)

APPENDIX "B"

Prof. Dr. med. C. Brian Burke
Hitchcock Clinic
Hanover, New Hampshire 03755

September 17, 1973

Professor, Dr. Dr. Bernhard Grzimek
Das Tier
D6 Frankfurt a.M. 1, Zoologischer

Dear Prof. Grzimek;

Thank you for your letter. It is for me a great honour that you wish to translate my letter "Incident in the Serengeti" into "das Tier." Naturally I give you permission.

The pictures and the film will be returned to me shortly, and as soon as I receive them I shall send them to you.

The interesting film and the pictures are in colour. The film was taken with Super 8mm film and 18 frames per second, therefore I am not quite certain if the film is feasible for television-broadcasting. This I will leave to the technicians.

In February I will visit East Africa, and who knows what the Serengeti has to show.

With friendly greetings,

Prof. Dr. med. C. Brian Burke

CBB/kim

APPENDIX "C"

17th November, 1976

CW/gc

Prof. Bernhard Grzimek,
168 Roderbergweg,
6 Frankfurt (Main) 60,
West Germany.

Dear Bernhard,

I have just had a letter from Dietar Plage who tells me that he believes you have a 100 ft sequence of a lioness attacking a small zebra and the mother charging the lion to drive her off. This would be just right for a Special we are making, about animal parenthood.

Is it possible we could have the original of this? If you want the original kept exactly as it is, we could make a dupe master.

Every good wish.

Yours,

Colin Willock
Executive Director

APPENDIX "D"

SURVIVAL ANGLIA LIMITED
Mr. Colin Willock
Executive Director
Brook House, Park Lane
LONDON W1Y 4DX, ENGLAND

8th of December, 1976
Your letter of
29th November, 1976
CW/gc

Dear Colin,

Thanks for your letter of 29th November. I paid Dr. Burke for the stills, but not for the film. I had the impression that he was quite happy that his film was used in television. If you want to contact him, his address is:

Prof. Dr. med. C. Brian BURKE
Department of Surgery
Dartmouth Medical School
Hanover, New Hampshire 03755, U.S.A.

As you are interested in the enflated animals, which Alan Root did for me - another film you could use would be about using my amphicar between the hippos etc. at Murchison Falls, which Alan Root did together with me years ago. An amphicar is a normal car with which you can drive into the water and swim with it. Maybe you are also interested in that?

Alan did also a nice film on the gorillas in Rwanda years ago, which shows also the volcanoes in action.

Best regards,

yours ever,

Bernhard Grzimek

APPENDIX "E"

CW/gc

29th November, 1976

Prof. Bernhard Grzimek,
168 Roderbergweg,
6 Frankfurt (Main) 60,
West Germany.

Dear Bernhard,

Thank you very much for answering my S.O.S. about the Zebra film so quickly. It really is the most sensational footage.

We will make sure that a credit is given to Dr. Burke and will return a complete dupe master to you.

Can you please let me know what we should do about paying Dr. Burke?

Every good wish, and thanks once again.

Yours,

Colin Willock
Executive Director

APPENDIX "F"

SURVIVAL ANGLIA LIMITED
Mr. Colin Willock
Executive Director
Brook House, Park Lane
LONDON W1Y 4DX, ENGLAND

8th of December, 1976
Your letter of
29th November, 1976
CW/gc

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Alan did also a nice film on the gorillas in Rwanda years ago, which shows also the volcanoes in action.

Best regards,

yours ever,

Bernhard Grzimek

APPENDIX "G"

JB/RKW

14th February 1977

Prof. E. Brian Burke
Department of Surgery
Dartmouth Medical School
Hanover
New Hampmshire
03755 U.S.A.

Dear Sir

This is to advise you that we have used 33 feet of your film material in our programme, "THE PARENTHOOD GAME" in the SURVIVAL series. We have a letter from Prof. Grzimek telling us you are happy for your film to be used, but not mentioning any reimbursement.

Could you please let me know what payment is due to you, and I will process this.

Many thanks,

Yours faithfully

JANET BARTLEY (MRS)
Administrative Assistant

APPENDIX "H"

March 2, 1977

Mrs. Janet Bartley
Administrative Assistant
Survival Anglia Limited
Brook House
Park Lane
London W1Y 4DX
ENGLAND

Dear Mrs. Bartley:

Thank you for your letter of the 14th of February referring to my film footage used in your programme "The Parenthood Game." I must apologize for the delay in replying to you, however I only returned from Dominica today and found your letter waiting for me.

Professor Grzimek was incorrect in assuring you that he had my permission to release this film for commercial use--I retain the copyright and should have been consulted prior to its inclusion in any television programme. The same film has been shown on a national network in this country without my permission and this may result in litigation.

The film of the zebra/lion encounter was loaned to Dr. Grzimek in 1973 for his personal teaching use at the University of Frankfort and for inclusion in a German television programme. No further television application was discussed or permitted.

I am grateful to Survival Anglia Limited for its courtesy in informing me that they have used my material. Indeed I wonder how many networks in other countries are currently showing it.

With regard to payment, I have no idea what to charge for your use of the film footage and would suggest that you reimburse me according to your usual rates--depending upon the unusual sequence presented, its importance to the programme, the time of day the film was used and the commercial, advertising revenue gained.

I look forward to hearing from you.

Yours faithfully,

C. Brian Burke, M.D.